

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SCOTT HOUCK,)	
)	No. CV-07-0365-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE,)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 12, 15.) Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Terry E. Shea represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff Scott Houck (Plaintiff) protectively filed for disability insurance benefits (DIB) and Supplemental Security Income

1 (SSI) on September 15, 2004. (Tr. 358.) He alleges disability due
2 to back pain, wrist pain, knee pain, and borderline intellectual
3 function (BIF), with an onset date in October 2003. (Tr. 180, 358,
4 365.) Plaintiff's date of last insured for DIB purposes was March
5 31, 2007. (Tr. 52.)

6 Following a denial of benefits at the initial stage and on
7 reconsideration, a hearing was held before Administrative Law Judge
8 (ALJ) Paul Gaughen on March 20, 2007. (Tr. 82-85, 88, 359.)
9 Plaintiff, who was represented by counsel, medical expert Jay M.
10 Toews, Ed.D., and vocational expert Joseph Moisan, Ed.D., appeared
11 and testified. (Tr. 360.) On March 30, 2007, ALJ Gaughen denied
12 benefits. (Tr. 52-62.) Additional evidence was submitted to the
13 Appeals Council, which denied review. (Tr. 5-9.) This appeal
14 followed. Jurisdiction is appropriate pursuant to 42 U.S.C. §
15 405(g).

16 STANDARD OF REVIEW

17 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
18 court set out the standard of review:

19 The decision of the Commissioner may be reversed only if
20 it is not supported by substantial evidence or if it is
21 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
22 1097 (9th Cir. 1999). Substantial evidence is defined as
23 being more than a mere scintilla, but less than a
24 preponderance. *Id.* at 1098. Put another way, substantial
25 evidence is such relevant evidence as a reasonable mind
26 might accept as adequate to support a conclusion.
27 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
28 evidence is susceptible to more than one rational
interpretation, the court may not substitute its judgment
for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
Morgan v. Commissioner of Social Sec. Admin. 169 F.3d 595,
599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,
resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th

1 Cir. 1995). The ALJ's determinations of law are reviewed
2 *de novo*, although deference is owed to a reasonable
3 construction of the applicable statutes. *McNatt v. Apfel*,
4 201 F.3d 1084, 1087 (9th Cir. 2000).

5 SEQUENTIAL PROCESS

6 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
7 requirements necessary to establish disability:

8 Under the Social Security Act, individuals who are
9 "under a disability" are eligible to receive benefits. 42
10 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
11 medically determinable physical or mental impairment"
12 which prevents one from engaging "in any substantial
13 gainful activity" and is expected to result in death or
14 last "for a continuous period of not less than 12 months."
15 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
16 from "anatomical, physiological, or psychological
17 abnormalities which are demonstrable by medically
18 acceptable clinical and laboratory diagnostic techniques."
19 42 U.S.C. § 423(d)(3). The Act also provides that a
20 claimant will be eligible for benefits only if his
21 impairments "are of such severity that he is not only
22 unable to do his previous work but cannot, considering his
23 age, education and work experience, engage in any other
24 kind of substantial gainful work which exists in the
25 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
26 the definition of disability consists of both medical and
27 vocational components.

28 In evaluating whether a claimant suffers from a
disability, an ALJ must apply a five-step sequential
inquiry addressing both components of the definition,
until a question is answered affirmatively or negatively
in such a way that an ultimate determination can be made.
20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
claimant bears the burden of proving that [s]he is
disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
1999). This requires the presentation of "complete and
detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

24 STATEMENT OF FACTS

25 The facts of the case are set forth in detail in the transcript
26 of proceedings, and are briefly summarized here. Plaintiff was 41
27 years old at the time of the administrative hearing. (Tr. 373.) In
28

1 1995, he was awarded disability benefits due to back problems and
2 borderline intellectual functioning. (Tr. 363, 365.) However, he
3 returned to work in 1996 and 1997 as a subcontractor for siding
4 installation and continued to work until his alleged onset date.
5 (Tr. 389.) Plaintiff reported he had a high school degree and most
6 of his classes up to high school were in special education. (Tr.
7 375.) He testified he could read, write and do basic math. (Tr.
8 376.) He was single and living with a friend and her children.
9 (Tr. 383.) He testified he did nothing around the house, and spent
10 much of his time watching television. (Tr. 384.) Plaintiff had
11 past work experience as a laborer (siding installer), dishwasher,
12 janitor, mechanic and parking lot sweeper. (Tr. 112-17, 396-97.)
13 He reported he stopped working due to back problems and pain. (Tr.
14 309, 394.)

15 ADMINISTRATIVE DECISION

16 The ALJ found Plaintiff had not engaged in substantial gainful
17 activity during the relevant time period. (Tr. 54.) At step two,
18 he found Plaintiff has medically determinable impairments of "status
19 post well healed fracture of the left wrist, mild patella grating of
20 the left knee, and mild depression." (Tr. 55.) After a lengthy
21 discussion of the medical evidence, Plaintiff's testimony, and
22 medical expert testimony, the ALJ found Plaintiff was not credible,
23 and his subjective symptom complaints were not sufficient to
24 establish a severe impairment. He determined Plaintiff did not have
25 a severe impairment or combination of impairments. (Tr. 55-60.) He
26 concluded Plaintiff was not "disabled" as defined by the Social
27 Security Act through the date of the decision. (Tr. 61.)

ISSUES

The question presented is whether there was substantial evidence to support the ALJ's decision denying benefits and, if so, whether that decision was based on proper legal standards. Plaintiff contends the ALJ erred when he (1) found no severe impairment, (2) improperly assessed Plaintiff's credibility, and (3) presented an incomplete hypothetical to the vocational expert. (Ct. Rec. 13 at 12-14.)

DISCUSSION

Plaintiff contends the medical evidence submitted regarding his mental and physical impairments is sufficient to satisfy the "*de minimis*" threshold at step two. In support of his claim of disability due to depression, Plaintiff submitted psychological evaluations by Robert Capes, Psy.D. (May 2005); Joyce Everhart, Ph.D. (December 2006); Frank Rosekrans, Ph.D, and mental health professional Kevin Shearer, M.A. (February 2005); and Dr. Rosekrans and mental health professional, Kathy Jamieson-Turn, M.S. (January 2006). Based on examining psychologist and the medical expert opinions, the ALJ found Plaintiff was not fully credible. (Tr. 60.) In support of this finding, the ALJ cited to the objective test results in reports by Drs. Everhart and Rosekrans, as well as medical expert testimony for Jay Toews, Ed.D. (Tr. 60, 283-93, 303-32.)

A. New Evidence

Plaintiff appears to rely on a post-hearing psychological evaluation by Dr. Frank Hamilton, submitted to the Appeals Council as evidence that he is more limited than found by the ALJ. (Ct.

1 Rec. 13 at 7-8.) He also appears to contend that this report
2 "undermines the ALJ's assessment of credibility." (*Id.* at 13.)
3 However, the Appeals Council declined to credit this evidence
4 because it did not relate to the period at issue. (Tr. 6.) The
5 Appeals Council shall consider "new and material" evidence only if
6 such evidence relates to the period on or before the date of the
7 ALJ's decision. 20 C.F.R. § 404.970; *Bates v. Sullivan*, 894 F.2d
8 1059, 1064 (9th Cir. 1990), *overruled on other grounds*, *Bunnell v.*
9 *Sullivan*, 947 F.2d 341, 342 (9th Cir. 1991). Further, post
10 administrative hearing psychological findings after an adverse
11 decision are "notoriously" unreliable." See *Vincent v. Heckler*, 739
12 F.2d 1393, 1395 (9th Cir. 1984); see also *Weetman v. Sullivan*, 877
13 F.2d 20, 23 (9th Cir. 1989). Because the new evidence is not
14 relevant to the period at issue and was not considered by the
15 Appeals Council, it is not considered by this court. 20 C.F.R. §
16 404.970(b)(1); *Bates*, 894 F.2d at 1064.

17 **B. Credibility**

18 As stated by the Ninth Circuit:

19 An ALJ cannot be required to believe every allegation of
20 disabling pain, or else disability benefits would be
21 available for the asking, a result plainly contrary to 42
22 U.S.C. § 423 (d)(5)(A. . . . This holds true even where
23 the claimant introduces medical evidence showing that he
24 has an ailment reasonably expected to produce some pain;
25 many medical conditions produce pain not severe enough to
26 preclude gainful employment.

24 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). In deciding
25 whether to admit a claimant's subjective symptom testimony, the ALJ
26 must engage in a two-step analysis. *Smolen v. Chater*, 80 F.3d 1273,
27 1281 (9th Cir. 1996). Under the first step, see *Cotton v. Bowen*, 799

1 F.2d 1403, 1405 (9th Cir. 1986), the claimant must produce objective
2 medical evidence of underlying "impairment," and must show that the
3 impairment, or a combination of impairments, "could reasonably be
4 expected to produce pain or other symptoms." *Id.* at 1281-82. If
5 this test is satisfied, and if there is no evidence of malingering,
6 then the ALJ, under the second step, may reject the claimant's
7 testimony about severity of symptoms with "specific findings stating
8 clear and convincing reasons for doing so." *Id.* at 1284. The ALJ
9 must make a credibility determination with findings sufficiently
10 specific to permit the court to conclude the ALJ did not arbitrarily
11 discredit claimant's testimony. *Bunnell v. Sullivan*, 947 F.2d at
12 345-46. "[Q]uestions of credibility and resolutions of conflicts in
13 the testimony are functions solely of the Secretary." *Sample v.*
14 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (quoting *Waters v.*
15 *Gardner*, 452 F.2d 855 n.7 (9th Cir. 1971). However, if malingering is
16 established, the adjudicator is not bound by the "clear and
17 convincing standard." See, e.g., *Rollins v. Massanari*, 261 F.3d
18 853, 857 (9th Cir. 2001).

19 In addition to the "ordinary techniques of credibility
20 evaluation," *Bunnell*, 947 F.2d at 346, the following factors may be
21 considered in the adjudicator's assessment: (1) the claimant's
22 reputation for truthfulness; (2) inconsistencies in the claimant's
23 testimony or between his testimony and his conduct; (3) claimant's
24 daily living activities; (4) claimant's work record; and (5)
25 testimony from physicians or third parties concerning the nature,
26 severity, and effect of claimant's condition. *Thomas v. Barnhart*,
27 278 F.3d at 947, 958-59 (9th Cir. 2002).

1 The evidence shows that in May 2005, after an interview and
2 mini-mental status examination (MMSE), Dr. Capes diagnosed
3 depressive order NOS, rule out dysthymic disorder and cyclothymic
4 disorder. (Tr. 257.) Dr. Capes did not administer objective
5 psychological tests, and his diagnoses were based entirely on
6 Plaintiff's self report. In July 2005, mental health counselor
7 Kevin Shearer, under the supervision of Dr. Rosekrans, administered
8 a battery of psychological tests as part of a comprehensive
9 psychological evaluation over the course of two days. (Tr. 307-22.)
10 The objective tests included the Wechsler Adult Intelligence Scale
11 (WAIS-III) and Wechsler Individual Achievement Test (WIAT-II), the
12 Conners' Continuous Performance Test, the Personality Assessment
13 Inventory (PAI), the Beck Depression Inventory (BDI-II), the Beck
14 Anxiety Inventory (BAI), a clinical interview, a Mental Status
15 Examination, and Trail Marking Test, A and B. After a lengthy
16 explanation of the test results and interpretation, the
17 psychological team diagnosed Plaintiff with Malingering and
18 Borderline Intellectual Functioning (BIF) that caused no more than
19 mild limitations in his social and cognitive functioning. (Tr. 320,
20 324-25.) Specifically, the examining source observed despite
21 Plaintiff's test responses that he was "scared and paranoid of
22 people," and BAI results in the "severe range for anxiety,"
23 Plaintiff adapted well to the tasks given and presented as pleasant
24 and cooperative. (Tr. 320.) The examiner reported that the test
25 results were those of an individual who "is usually involved in some
26 type of inpatient medical/psychiatric program, under close
27 supervision for suicide precaution and severe monitoring." *Id.* As
28

1 noted by the examiner, these results were inconsistent with
2 Plaintiff's behavior and report of daily activities, *i.e.*, Plaintiff
3 was independent in his activities of daily living, was able to move
4 freely, was able to walk up a flight of stairs, did not appear to
5 use his cane for assistance, could sit for prolonged periods during
6 testing, and reported a meaningful relationship with his significant
7 other. (Tr. 320.) In addition, test results from the PAI were
8 invalid, and indicated extremely negative self-presentation and
9 malingering. (Tr. 319.) Although BIF was diagnosed, Dr. Rosekrans
10 and Mr. Shearer opined Plaintiff was suitable for on-the-job
11 training and capable of work. (Tr. 322.)

12 Dr. Everhart administered objective psychological tests in
13 December 2006. (Tr. 283-90.) Based on the results, Dr. Everhart
14 found clear evidence of malingering and failure to make a credible
15 effort on intelligence tests. (Tr. 286, 289.) She warned that
16 results of the intelligence tests (WAIS III) should be "interpreted
17 with caution as they may not represent a credible effort." (Tr.
18 288.) She observed Plaintiff did not need help to complete his
19 activities of daily living, that he could cook, pay bills, clean, do
20 laundry and attend to his personal hygiene. (Tr. 286-87, 289.)
21 Although he presented as mildly depressed, angry and irritated, Dr.
22 Everhart opined his attention, concentration and intellectual
23 ability were within normal limits. (Tr. 286, 289.) She diagnosed
24 malingering, pain disorder, learning disorder NOS, and depressive
25 disorder NOS (by history), which as noted, was unreliable. (Tr.
26 289.)

27 In January 2006, Dr. Rosekrans and mental health professional
28

1 Kathy Jamieson-Turner, M.S., re-evaluated Plaintiff. (Tr. 327-32.)
2 Extensive objective tests were administered, including the Test of
3 Memory and Malingered (TOMM), the BDI-II, and MMPI-2, all of which
4 were found invalid and/or indicative of malingering and exaggeration
5 of symptoms. (Tr. 329-30.) The examiner also observed behavior
6 incongruent with test results and concluded, "There was nothing in
7 [Plaintiff's] presentation to suggest he is sufficiently impaired
8 psychologically to prevent him from working." (Tr. 332.)

9 At the hearing, Dr. Toews summarized the psychological evidence
10 and testified that Dr. Everhart's IQ testing was not reliable due to
11 the extent of malingering indicated by the objective testing results
12 in her report. (Tr. 367-68.) He opined Plaintiff's BIF caused only
13 slight limitations based on the medical record in its entirety, and
14 factoring in the unreliability of Plaintiff's self-report and poor
15 effort on testing. (Tr. 366-71.) Medical expert testimony relied
16 upon by the ALJ is well supported by and consistent with other
17 evidence in the record; therefore, the ALJ properly relied on Dr.
18 Toews' opinions. *Andrews*, 53 F.3d at 1041.

19 The evidence as a whole includes extensive affirmative evidence
20 of malingering; therefore, the "clear and convincing" standard did
21 not apply. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
22 Nonetheless, the ALJ gave other specific reasons to discount
23 Plaintiff's credibility. For example, he first noted there was no
24 medical evidence of abnormality that would account for the severity
25 of Plaintiff's complaints. (Tr. 60.) This is a valid consideration
26 that is supported by the evidence discussed above and reports from
27
28

1 orthopedic specialist Dr. Bagby,¹ who found no objective evidence of
2 abnormalities in Plaintiff's lumbar spine and opined Plaintiff was
3 capable of light to medium work. (Tr. 249, 341.) See 20 C.F.R. §§
4 404.1529(c)(2), 416.929(c)(2); *Rollins*, 261 F.3d at 856-57. The ALJ
5 noted Plaintiff carried a cane that was not prescribed, and Waddell
6 tests were positive. (Tr. 60.) It also is noted on independent
7 review if the record that Plaintiff's treatment provider at
8 Community Health Association of Spokane observed although Plaintiff
9 presented with a cane, he did not use it during the examination and
10 did not limp. (Tr. 236.) Mr. Shearer and Dr. Bagby made a similar
11 observations. (Tr. 247, 320.) In January 2007, examining physician
12 Michael Carraher, M.D., observed Plaintiff's gait while walking in
13 the parking lot was much better than his gait on exam and reported
14 "his physical complaints significantly outweigh the findings on
15 exam." (Tr. 59, 294, 297.) The ALJ also noted Plaintiff
16 inconsistently reported back pain, wrist surgeries, and blindness in
17 his left eye to the various examiners. (Tr. 60-61.)

18 The ALJ further found Plaintiff was able to learn auto
19 mechanics and worked as a mechanic between 1997 and 2003, belying
20 his claims of cognitive deficiency. (Tr. 60, 393-94.) He noted
21 that IQ scores went down from the school records without evidence of
22 injury or trauma. (Tr. 60.) As discussed above, Drs. Everhart and
23 Dr. Toews expressed doubt that recent IQ tests results were

24
25 ¹ Under the Regulations, the opinions of medical specialists
26 are generally given more weight than doctors who do not specialize
27 in the relevant practice area. 20 C.F.R. §§ 404.1527(d)(5),
28 416.927(d)(5).

1 accurate, due to objective evidence of poor effort. (Tr. 288, 367.)
2 These are specific reasons supported by substantial evidence to
3 discredit credibility. *Fair*, 885 F.2d at 603-04. Combined with the
4 significant diagnoses of malingering, the reasons given by the ALJ
5 for rejecting the severity of Plaintiff's statements are "clear and
6 convincing." The ALJ did not err in his credibility assessment.

7 **C. Step Two Evaluation**

8 To satisfy step two's requirement of a severe impairment, the
9 claimant must prove the existence of a physical or mental impairment
10 by providing medical evidence consisting of signs, symptoms, and
11 laboratory findings; the claimant's own statement of symptoms alone
12 will not suffice. 20 C.F.R. §§ 404.1508, 416.908. It follows that
13 credibility is properly considered when there are significant
14 inconsistencies between a claimant's symptom allegations and the
15 medical evidence. See *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir.
16 2005).

17 The effects of all symptoms must be evaluated on the basis of
18 a medically determinable impairment which can be shown to be the
19 cause of the symptoms. 20 C.F.R. §§ 404.1529, 416.929. Once
20 medical evidence of an underlying impairment has been shown, medical
21 findings are not required to support the alleged severity of pain or
22 symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).
23 The Commissioner has passed regulations which guide dismissal of
24 claims at step two. Those regulations state an impairment may be
25 found to be "non-severe" only when evidence establishes a "slight
26 abnormality" that has "no more than a *minimal effect* on an
27 individual's ability to work." *Id.* (citing *Social Security Ruling*

(SSR) 85-28). In SSR 96-4p, "the Commissioner emphasized the importance of objective medical evidence to a determination of disability." *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005). "At step 2 of the sequential evaluation process, an impairment or combination of impairments is considered 'severe' if it significantly limits an individual's physical or mental abilities to do basic work activities." SSR 96-3p. Medical evidence, alleged symptoms and other evidence must be considered when determining whether an impairment, or combination of impairments, is severe. *Id.*

Although the ALJ identified medically determinable impairments of post status wrist fracture, mild patella grating of the left knee and mild depression, after a thorough discussion of medical evidence and consideration of the record in its entirety, he found none of the impairments alone or in combination "significantly limited (or is expected to significantly limit) [Plaintiff's] ability to perform basic work-related activities for 12 consecutive months." (Tr. 59.) This step two finding is supported by Dr. Bagby's 2005 report as well as imaging of the lumbar spine. (Tr. 239, 248-49.) On re-evaluation in 2006, Dr. Bagby found full range of motion in the left knee and no grating or other abnormalities. (Tr. 340.) This evidence is also consistent with Dr. Carraher's findings in 2007,² (Tr. 297), as well as the assessments made by agency physicians. (Tr. 282.) As discussed above, the examining psychologists

² Imaging reviewed by Dr. Carraher showed a "minimal wedge compression at L1," but the doctor found no tenderness in this area. (Tr. 296.)

1 consistently found affirmative evidence of malingering in objective
2 test results. This factor significantly discredited Plaintiff's
3 allegations of disability due to physical and mental impairments.

4 Plaintiff's unreliable statements alone cannot establish the
5 requisite level of severity at step two. SSR 85-28. It is the
6 ALJ's responsibility to resolve conflicts and ambiguities in the
7 evidence. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d
8 1190, 1195-96 (9th Cir. 2004). Plaintiff's complaints of pain,
9 limitations and depression to examining physicians and psychologists
10 were properly discounted by the ALJ in light of clear evidence of
11 malingering. The ALJ took great care in discussing and evaluating
12 the medical evidence before concluding Plaintiff's established
13 impairments were not severe. Because the entire record supports the
14 ALJ's credibility assessment, his interpretation of the medical
15 evidence, and resolution of the conflicts between Plaintiff's
16 statements and the medical evidence, the court may not substitute
17 its judgment for that of the Commissioner. *Tackett*, 180 F.3d at
18 1098. Having found no impairment or combination of impairments that
19 significantly limits Plaintiff's ability to perform basic work
20 activities, the ALJ properly concluded at step two that Plaintiff
21 was not under a disability during the period at issue. *Celaya v.*
22 *Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003). Accordingly,

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
25 **DENIED.**

26 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
27 **Rec. 15**) is **GRANTED.**

1 The District Court Executive is directed to file this Order and
2 provide a copy to counsel for Plaintiff and Defendant. The file
3 shall be **CLOSED** and judgment entered for **DEFENDANT**.

4 DATED November 3, 2008.

5
6 S/ CYNTHIA IMBROGNO
7 UNITED STATES MAGISTRATE JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28